STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

(On Appeal from the Court of Appeals)

LISA TYRA,

Plaintiff-Appellee,

vs.

ORGAN PROCUREMENT AGENCY OF MICHIGAN, a Michigan corporation d/b/a GIFT OF LIFE MICHIGAN, STEVEN COHN, M.D., DILLIP SAMARA PUNGAVAN, M.D., WILLIAM BEAUMONT HOSPITAL, a Michigan corporation, and JOHN DOE, believed to be Transplant Coordinator,

Defendants-Appellants.

Supreme Court No. 148087
Court of Appeals No. 298444
L.C. Case No. 09-103111-NH

SUPPLEMENTAL BRIEF OF DEFENDANTS/APPELLANTS WILLIAM BEAUMONT HOSPITAL AND STEVEN COHN, M.D.

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QUESTION PRESENTED FOR REVIEW

1. Whether the Defendants' Affirmative Defenses were sufficient to give notice of the nature of the defense to permit Plaintiff to take a responsive position or were defective because they did not specifically state the grounds for the defense.

INTRODUCTION

Defendants-Appellants STEVEN COHN, M.D. and WILLIAM BEAUMONT HOSPITAL filed their Application for Leave to Appeal in this Court, seeking to reverse the decision of the Court of Appeals and to affirm the dismissal of Plaintiff's Complaint, with prejudice, entered by the Oakland County Circuit Court. On November 26, 2014, this Court directed the Clerk to schedule oral argument on whether to grant the Application or take other action pursuant to MCR 7.302(H)(1). The Court also permitted the parties to file supplemental briefs, although they should not be mere restatements of their Application papers. This supplemental brief addresses one of the issues contained in the Court's MOAA Order. Based on the arguments contained in the Application, and for the reasons cited herein, the Circuit Court's Order dismissing the claims with prejudice should be affirmed.

RELEVANT CIRCUIT COURT FACTS AND PROCEEDINGS

Plaintiff-Appellee Lisa Tyra served a Notice of Intent to Defendants/Appellants, including William Beaumont Hospital, Steven Cohn, M.D. ("Defendants" or "Beaumont Defendants") and Organ Procurement Agency of Michigan, d/b/a Gift of Life, Michigan ("OPAM" or "Gift of Life"), on April 23, 2009 and 112 days later, Plaintiff filed a Complaint in the Oakland County Circuit Court. (Exs. D and E to Defendants' Application for Leave to Appeal).[1] The Beaumont Defendants filed their Answer and Affirmative Defenses September 9, 2009, as did Defendant Gift of Life. Plaintiff filed a response to each. Relevant to this appeal is Defendants' Affirmative Defense No. 4 which stated:

> If necessary, Defendants assert all of the benefits of the provisions set forth in Michigan's tort Reform Acts of 1986, 1993 and 1995 regarding non-economic caps, set-offs, reduction to present values, set-offs for collateral payment, such as insurance, social security, etc. and any other damage reduction deemed applicable by the Michigan Appellate Courts in interpretation of the statutes.

Defendants also reserved the right to add other affirmative defenses as they became known. (Ex. A, Defendants' Affirmative Defenses).

Plaintiff's response to the affirmative defense was:

> Answering the allegations affirmatively stated under Paragraph 4, plaintiff denies that same are appropriate or proper. Further, Plaintiff objects as defendants have not put plaintiff on notice as to any particular legislation or particular citation within such legislation, and Defendant's notice is ineffective. Likewise, plaintiff cannot now be on notice of what Michigan Appellate Courts may or may not do in interpreting statutes.

Gift of Life also filed its Answer and Affirmative Defenses September 9, 2009. The relevant affirmative defenses included:

> No. 4: Plaintiff's claims set forth in this Complaint are barred by the applicable statute of limitations and/or statute of repose.

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[1] Exhibits which were previously provided by Defendants or OPAM in their Applications are referred to as listed in the respective Applications. Exhibits A through E, which were not previously provided by Defendants are attached to this Supplemental Brief.

(Ex. B, Plaintiff's Reply to Defendants' Affirmative Defenses).

No. 10: Plaintiff is bound by any and all applicable statutes relative to medical malpractice actions enacted by the Michigan Legislature as part of the 1995 Michigan Tort Reform Legislation.

No. 11: Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A2912b and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition.

No. 12: Plaintiff's claims are barred for failing to provide adequate information in her Notice of Intent as required by MCL 600.2912b.

(Ex. C to OPAM's Application for Leave to Appeal).

Plaintiff's response to those defenses:

No. 4: Denied for the reason same appears not to be true.

No. 10: Denied for the reason same appears not to be true. Further, objection is made as Defendant's allegations do not place Plaintiff on notice of the bases for Defendant's allegations and prayer for relief.

No. 11: Denied for the reason same appears not to be true.

No. 12: Denied for the reason same appears not to be true.

(Ex. D. to OPAM's Application for Leave to Appeal).

Gift of Life later filed a motion for summary disposition pursuant to MCR 2.116(C)(7) on January 13, 2010. It argued that Plaintiff's failure to comply with the 182 day notice waiting period of MCL 600.2912b prior to filing her Complaint on August 13, 2009 rendered it a nullity and insufficient to commence a cause of action. Dismissal was required because Plaintiff failed to commence an action prior to the expiration of the two year limitation period for a medical malpractice claim, which expired December 8, 2009. (Ex. E to OPAM's Application).

Defendants concurred in Gift of Life's motion for summary disposition and filed a brief in support of the motion. (Ex. C, Defendants' Concurrence with Co-Defendant's Motion for Summary Disposition). Defendants argued that Plaintiff had never commenced a medical

malpractice action, citing *Burton v Reed City Hospital*, 471 Mich 745; 691 NW2d 424 (2004), as well as the recently issued Michigan Court of Appeals opinion in *Driver v Naini,* 287 Mich App 339; 788 NW2d 848 (2010), revs'd 490 Mich 239; 802 NW2d 311 (2011). Failure to comply with the notice waiting period of § 2912b before filing her Complaint rendered Plaintiff's Complaint insufficient to commence a medical malpractice action. The statute of limitations had continued to run and expired December 9, 2009. Dismissal with prejudice was therefore required. Defendants sought dismissal of Plaintiff's Complaint against all Defendants, as barred by the statute of limitations. (Ex. C, Defendant's Concurrence with Co-Defendant's Motion for Summary Disposition, p 6).

Ms. Tyra filed answers to the motions of both Defendants and Gift of Life. She argued that Gift of Life's affirmative defenses failed to comply with MCR 2.111(F)(3) and were therefore waived. She argued that only one of Gift of Life's affirmative defenses might be applicable, "but only if there were sufficient factual accompaniment to support such an assertion and if Plaintiff was made aware of Plaintiff's deficiency, citing Gift of Life's affirmative defense No. 11. Further, Plaintiff advanced the argument that Gift of Life was aware of Plaintiff's objection to Defendants' Affirmative Defense No. 4 which Plaintiff found "identical to MCLA 600.2912(b)." (Ex. H to Defendants' Application, p 9, fn 2). Knowing this, Plaintiff asserted Gift of Life should have amended its affirmative defenses. (*Id.*, p 9).

Plaintiff also responded to Defendants' concurrence with OPAM's motion for summary disposition (Ex. D, Plaintiff's Response to Defendants' Concurrence). Plaintiff claimed Defendants' affirmative defenses did not refer to MCL 600.2912(b) and that the defense was thus waived. (Ex. D, Plaintiff's Response, p 2). However, Plaintiff incorporated her answer to Gift of Life's motion in her Response to Defendants' Concurrence. In her Answer to Gift of

Life's motion Plaintiff asserted that its affirmative defense No. 11 and Defendants' affirmative defense no. 4 both related to the same defense – the notice requirements of § 2912b. Plaintiff took a contrary position in the Court of Appeals.

The circuit court was aware of Plaintiff's waiver argument, contained both in her written response and raised during oral argument on April 7, 2010, but nonetheless accepted Defendants' brief, considered this argument at the hearing and specifically granted the relief requested by Defendants' motion, along with that of Gift of Life, dismissing the case with prejudice against all Defendants on the basis of *Burton, supra,* 471 Mich 754-755. (Ex. C to Defendants' Application, Circuit Court's 10/11/13 Order and Opinion). The trial court found *Burton* to be controlling, rejecting Plaintiff's waiver argument pursuant to MCR 2.116(F)(3) and finding that the affirmative defenses asserted in *Burton* (which this Court found to be sufficient) were "virtually identical" to the defenses raised by Gift of Life. *Id.*, p 3.[2]

STANDARD OF REVIEW

Issues of statutory interpretation are reviewed *de novo. Dep't of Transportation v Tomkins,* 481 Mich 184, 190; 749 NW2d 716 (2008). Rulings on motions for summary disposition are also reviewed *de novo. Driver v Naini,* 490 Mich 239, 246; 802 NW2d 311 (2011).

[2] Plaintiff's arguments that in reaching its decision, *Burton* considered MCR 2.116(D)(2), rather than the court rule at issue here, MCR 2.111(F)(3), and that *Burton* had no relevance to this case, were likewise rejected. The circuit court noted that *Burton* contained an "analogous waiver argument."

ARGUMENT

I. DEFENDANTS' AFFIRMATIVE DEFENSES WERE SUFFICIENT TO APPRISE PLAINTIFF OF THE LEGAL BASIS FOR THE DEFENSE, THAT PLAINTIFF FAILED TO COMPLY WITH THE PRE-SUIT NOTICE REQUIREMENT OF MCL 600.2912b BY PREMATURELY FILING A COMPLAINT WHICH DID NOT SERVE TO TOLL THE STATUTE OF LIMITATIONS WHICH HAD SINCE EXPIRED.

A. The Affirmative Defenses Of Co-Defendant OPAM, Which Mirror Those In *Burton*, Were Sufficient To Give Notice Of The Nature Of The Defense And Permit Plaintiff To Take A Responsive Position.

Affirmative defense No. 11 filed by OPAM was sufficient to preserve the right to assert a statute of limitation defense based on a failure to comply with the pre-suit notice period of MCL 600.2912b.[3] The trial court found that the affirmative defenses were nearly identical to those in *Burton,* where this Court rejected plaintiff's argument that they constituted a waiver of the affirmative defense. The plain language of MCL 600.2912b requires Plaintiff to wait a specified time before filing suit.

MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, **a person *shall not commence an action* alleging medical malpractice** against a health professional or health facility **unless the person has given** the health professional or health facility **written notice under this section not less than 182 days before the action is commenced.** (Emphasis added).

MCL 600.2912(b)(8) provides:

> If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period.

Plaintiff did not wait either the 182 day period established by MCL 600.2912b(1) or the 154 day period of MCL 600.2912b(8) before filing her complaint.

[3] Plaintiff argued that the Beaumont Defendants' affirmative defense no. 4 "was identical to MCLA 600.2912b" and OPAM was thus aware of Plaintiff's objection to OPAM's affirmative defense 11 and obligated to modify it.

On appeal Ms. Tyra challenged the sufficiency of the affirmative defenses claiming Plaintiff "fully complied with the pre-suit notice required of 2912b by mailing her April 23, 2009 Notice of Intent to all defendants." According to Plaintiff, subsequent dismissal was due to filing her complaint prematurely. (Plaintiff's Court of Appeals Brief on Appeal, p 6). Plaintiff ignores the fact that compliance with the pre-suit notice provision of the statute requires Plaintiff to not only provide timely notice to Defendants, but also to wait the required number of days in the applicable notice period before filing a complaint. Among the purposes for doing so is to encourage settlement without the need for formal litigation. *Driver v Naini,* 490 Mich App 239, 254-255; 840 NW2d 730 (2013). Defendants were deprived of this opportunity by Plaintiff's premature action. Plaintiff's argument was that OPAM's statement that "Plaintiff failed to comply with the notice provisions of 2912b and that Plaintiff's claim is thus barred" did not correspond to the motion for summary disposition it later filed. *Id.*, p 6. Instead, Plaintiff asserted that the "fact" associated with the affirmative defense which was not conveyed, was that Plaintiff did not comply with the pre-suit waiting period of § 2912b.

The statement that Plaintiff failed to comply with the notice provisions of § 2912b reasonably included the requirement to provide 182 days or 154 days' notice to the health professional or facility before commencing an action. The statute is neither complex nor lengthy, rather it is clear and unambiguous and primarily addresses two requirements: timing and content. The timing requirement mandates giving notice of the intent to sue to all Defendants and then requires waiting for the applicable notice period to expire before commencing a lawsuit. (MCL 600.2912b(1), (3), (8) and (9)). The content requirement mandates that certain information must be provided in the notice of intent to alert Defendants to the basis of Plaintiff's claims. (MCL 699.2912b(4)). Reference to the "notice provisions" of the statute was sufficient

to alert Plaintiff to potential deficiencies without any additional roadmap. *Burton* itself referred to the "notice provisions" of MCL 600.2912 when addressing the mandatory 182 day written notice to potential defendants, as OPAM has previously noted. (OPAM Court of Appeals Brief, p 8). Plaintiff should have been aware of this language, based on *Burton,* which specifically addressed the question "whether a complaint alleging medical malpractice that is filed before the expiration of the notice period provided by MCL 699.2912b tolls the period of limitations." *Burton,* 471 Mich at 747.

The focus of *Burton* was on the sufficiency of the affirmative defenses: whether defendants had asserted §2912b and statute of limitations as defenses to the action. Based on the language of the affirmative defenses, it was clear to the Court in *Burton* that Defendants had raised these defenses adequately (i.e., the defenses were sufficient). *Burton,* 471 Mich at 755.

Here, the analysis employed by the circuit court was correct. *Burton* considered defenses which were "virtually identical" to the defenses in this case and whether waiver would prevent defendants from asserting those defenses. The analysis is the same, whether MCR 2.111(F) is involved, or MCR 2.116(D)(2), as in *Burton,*: there was no waiver where the affirmative defense and answer cited the statute of limitations and §2912b. It was Plaintiff's burden to comply with the notice requirements of §2912b and compliance is mandatory. *Burton* reasoned:

> The fact that defendants did not bring their motion for summary disposition until the period of limitations had run does not constitute a waiver of the defense. MCL 600.2912b places the burden of complying with the notice provisions on the plaintiff. *Roberts I, supra* at 66. . . .[T]he purpose of a tolling provision is to protect a plaintiff from a statute of limitations defense. Here, defendants specifically raised the statute of limitations and plaintiff's compliance with MCL 600.2912b in their answer and affirmative defenses.

> Such a direct assertion of these defenses by defendants can by no means be considered a waiver. *Roberts I, supra* at 68-70. To the contrary, it was a clear affirmation and invocation of such defenses. Defendants' pleadings were more than sufficient to comply with the requirements of MCR 2.116(D)(2) (requiring the statute of limitations to be raised in the first responsive pleading or in a motion filed before the responsive pleading). *Burton, supra* at 754-755.

The assertion of the defenses in defendants' answer precluded plaintiff's waiver argument in *Burton.* They were sufficiently specific to assert the defense and could not be considered a waiver. Neither can the defenses be considered waived in this case. OPAM adequately stated its affirmative defenses consistent with the court rules and *Burton, supra.*

"The primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mutual Automobile Ins Co,* 200 Mich App 307, 317; 503 NW2d 758 (1993) (internal citations omitted). No affirmative defense will be held insufficient where the defense is "sufficient to permit the opposite party to take a responsive position." *Hanon v Barber,* 99 Mich App 851, 856; 298 NW2d 866 (1980) (internal citations omitted). It is Plaintiff's burden to comply with the statute. *Burton,* 471 Mich at 754-755. If Plaintiff was uncertain regarding the meaning of the affirmative defense, prudence would counsel reviewing the content and timing provisions of the statute. Alternatively, a motion for more definite statement pursuant to MCR 2.115(A), requesting more detail, could have been filed, but was not. Plaintiff's waiver argument was properly rejected by the trial court.

B. The Beaumont Defendants Did Not Waive The Affirmative Defense That Plaintiff Failed To Comply With The Notice Provisions Of MCL 600.2912b, Despite The Failure To Specifically Raise It In Defendants' First Responsive Pleading. The Defense Was Asserted In Defendants' Concurrence And Brief Supporting Gift Of Life's Motion For Summary Disposition. Plaintiff Argued Waiver In Her Response And At The Hearing. The Circuit Court Held No Waiver Occurred And Dismissed The Lawsuit Granting Dismissal To All Defendants.

The affirmative defenses of the Beaumont Defendants did not address MCL 600.2912b specifically, as did OPAM. Nonetheless, Plaintiff argued in the trial court that Defendants had raised MCL 600.2912b in their affirmative defenses and challenged the sufficiency of both Defendants and OPAM's defenses on the same basis in her Answer to OPAM's summary disposition motion. Plaintiff was thus well aware of the basis of Defendants' affirmative defense, but argued additional facts were needed to explain it.

A trial court's decision to grant or deny a motion to amend is reviewed for an abuse of discretion. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion occurs when a trial court's decision "results in a decision falling outside the range of principled outcomes." *Barnett v Hildago,* 478 Mich 151, 158; 732 NW2d 472 (2007).

The court rule requires affirmative defenses to be raised in a party's first responsive pleading, however an affirmative defense may also be asserted through a motion to amend before trial pursuant to MCR 2.118(A)(1) or (2) (see MCR 2.111(F)(2)). The motion need not be written if raised at a hearing or trial. MCR 2.119(A)(1). "Affirmative defenses, even if not asserted in the initial answer, may be introduced by amendment." *Ben P. Fyke & Sons v Gunter Co*, 390 Mich 649, 667; 213 N.W.2d 134 (1973). A trial court's discretion to permit amendment to cure deficiencies under this rule "is not an act matter of grace, but a right of a litigant seeking to amend '[i]n the absence of any apparent or declared reason . . .'" *Id.* at 659 (internal citations

omitted). This Court has consistently recognized that a motion to amend should ordinarily be granted "and should be denied only for particularized reasons" such as:

> [1] Undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . .

Weymers v Khera, supra, 454 Mich at 658 quoting *Ben Fyke, supra,* at 656. See also *Sands Appliance Services, Inc v Wilson,* 463 Mich 231; 239-240; 615 NW2d 241 (2000). For that reason, a trial court abuses its discretion when it utilizes its discretion "to obviate a recognized claim or defense." *Id.*

"Prejudice" in this context does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits. *Weymers, supra,* citing *Fyke, supra,* at 657. "Rather, 'prejudice' exists if the amendment would prevent the opposing party from receiving a fair trial, if for example the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Id.*, citing *Fyke*, at 663; *Sands Appliance Services, Inc. supra,* at 239, n. 6. No such recognized impediment existed here. The litigation was in its early stages and discovery was ongoing until October 11, 2010. Gift of Life filed its motion for summary disposition January 13, 2010. The defense was raised in Defendant's concurrence dated March 19, 2010. A hearing on the Motion for Summary Disposition took place on April 7, 2010. No prejudice to Plaintiff existed as the term is construed by this Court. The fact that amending Defendants' affirmative defenses would add a defense which would eliminate Plaintiff's claim is not a reason to deny amendment. The fact that the "proffered amendment may cause the opposing party ultimately to lose on the merits . . . is not a factor to be considered in deciding whether to grant the motion." *Fyke*, 390 Mich at 657.

Moreover, a trial court may constructively grant leave to amend affirmative defenses. In *Cole v Ladbroke Racing MI, Inc*, 241 Mich App 1, 9-10; 614 NW2d 169 (2000), the issue before the Court of Appeals was whether defendant waived the affirmative defense of statutory immunity by failing to raise it in its first responsive pleading. Ordinarily, the Court would have deemed the defense waived. In concluded, however, that since the trial court heard argument regarding the issue of immunity at the hearing on defendant's motion for summary disposition, and later rendered its ruling based on immunity, it had constructively granted leave to amend by allowing argument and dismissing the action on that basis. The Court of Appeals reached this conclusion notwithstanding the fact that the trial court had later denied defendant's motion for leave to amend its affirmative defenses to add the defense of immunity. *Id.* at 9-10.

The trial court's actions here indicated the court's intent to allow Defendants to assert the affirmative defense of statute of limitations based on Plaintiff's failure to comply with the notice provisions of MCL 600.2912b. Evidence indicates the court impliedly/constructively allowed amendment of the affirmative defense. The circuit court was clearly aware of the relief Defendants were seeking and the basis for the statute of limitations argument raised in Defendant's concurrence and motion, as well as in OPAM's Motion for Summary Disposition. Plaintiff raised the issue of waiver of the affirmative defenses as a bar to the relief sought by all Defendants. The court heard argument regarding waiver and expiration of the statute of limitations based on *Burton, supra,* and the Court of Appeals then recent opinion in *Driver v Naini,* 287 Mich App 339; 788 NW2d 848 (2010). The court did not find that the affirmative defenses were deficient or that the Beaumont Defendants were precluded from arguing for dismissal on the basis of MCL 600.2912b. Instead, it granted the relief sought by *all* Defendants, thus constructively granting amendment of Defendants' affirmative defenses based on the

arguments advanced in the concurrence and motion filed. It found the defenses in *Burton* were "virtually identical" to the defenses articulated in the instant case by OPAM, which Plaintiff argued were identical to the affirmative defense raised by Defendants. The affirmative defense was "sufficient to permit" Plaintiff to take a responsive position. *Hanon, supra*, 99 Mich App at 856. Because the issue was fully briefed and argued, there was no prejudice to Plaintiff and no abuse of discretion in constructively allowing amendment and dismissing Plaintiff's action with prejudice.

In *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1; 687 NW2d 309 (2004), although the defendant failed to assert the statute of limitations in previous answers to plaintiff's complaint and did not move to amend its affirmative defenses until after it raised the statute of limitations defense in a motion for summary disposition, the Court of Appeals nonetheless rejected plaintiff's argument that defendant had waived the defense because it was not included as an affirmative defense in any of its responsive pleadings. There was no evidence of bad faith or undue delay and the amendment did not prejudice plaintiff's ability to respond to the issue.

Although Defendants' Affirmative Defenses did not reference Plaintiff's failure to comply with provisions of MCL 600.2912b, which resulted in expiration of the statute of limitations, Plaintiff was not unfairly surprised by assertion of the defense, based on her response to OPAM's motion for summary disposition and to Defendants' concurrence and brief. Moreover, had the trial court found the affirmative defense inadequate, it was within its discretion to have granted leave to amend, in which case the result would be the same – Plaintiff's premature complaint did not toll the running of the limitations period, which eventually expired. Because the trial court had discretion to allow amendment of the pleadings,

and in the interest of judicial efficiency, the Court should find no waiver of the affirmative defense related to MCL 600.2912b.

II. EVEN IF THE CIRCUIT COURT HAD CONCLUDED THE AFFIRMATIVE DEFENSES WERE INSUFFICIENT, DISMISSAL WAS STILL REQUIRED WHERE THE PERIOD OF LIMITATIONS WAS NOT TOLLED BY PLAINTIFF'S PREMATURELY FILED COMPLAINT, AND HER CLAIMS WERE ALREADY TIME-BARRED AT THE TIME THE CIRCUIT COURT RULED.

Plaintiff appealed her dismissal to the Court of Appeals which rejected both Defendants' affirmative defenses and those of OPAM as inadequate to satisfy the requirements of MCR 2.111(F)(3). (Ex. A to Defendant's Application, 8-15-13 Opinion, p 4). The Court of Appeals majority also rejected Defendants' argument that the trial court had constructively granted leave to amend their affirmative defenses by considering the merits of Defendants' argument that Plaintiff failed to comply with MCL 600.2912b. The majority saw no "overt" action by the circuit court which would indicate constructive amendment. The majority also found that amendment of the affirmative defenses after the expiration of the limitations period would have prejudiced Plaintiff by barring her claim and would not, therefore, have been permissible. (Ex. A, Opinion, p 5). The majority did, however, accept Defendants' argument that summary disposition was warranted "because, ultimately, Plaintiff's premature complaint simply failed to commence the action."

Plaintiff filed her medical malpractice complaint prematurely, long before the notice period of MCL 600.2912b expired, whether that time is computed pursuant to the 182 day notice period of § 2912b(1) or the 154 day notice period of § 2912b(8). As a result, Plaintiff's lawsuit was never commenced as recognized by this Court in *Auslander v Chernick,* 480 Mich App 910; 739 NW2d 620 (2007), adopting the reasoning of the dissenting opinion in *Auslander v*

Chernick, unpublished opinion per curiam of the Court of Appeals, decided May 1, 2007 (No. 274079) (Jansen, J. dissenting). (Ex. E). In lieu of granting leave to appeal this Court reversed the judgment of the Court of Appeals "for the reasons stated in the Court of Appeals dissenting opinion," and remanded the case to circuit court for entry of judgment granting defendants' motion for summary disposition.

"An order of this court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *DeFrain v State Farm Mutual Automobile Ins Co,* 491 Mich 359, 369-370; 817 NW2d 504 (2012). The Court noted that these requirements were constitutionally mandated by Constitution 1963, art. 6; § 6 which states:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

The facts and analysis necessary to support the final disposition of the application were set forth in *Auslander.* Therefore, "[b]y referring to the Court of Appeals dissent, this Court adopted the applicable facts and reasons supplied by the dissenting judge as if they were its own." *DeFrain,* 491 Mich at 369.

In *Auslander,* plaintiffs filed a medical malpractice complaint without an affidavit of merit. Defendants' answers asserted that the claim was barred by the statute of limitations and that plaintiffs' affidavit of merit failed to comply with MCL 600.2912a and 2912d. Defendants then moved for summary disposition, which was denied. The trial court accepted plaintiffs' argument that defendants had waived their affirmative defense because of their failure to set forth a factual basis for the affirmative defenses as required by MCR 2.111(F)(3). The Court of Appeals affirmed. (Ex. E).

This Court reversed, "for the reasons stated in the Court of Appeals' dissenting opinion." (*Auslander, supra* at 910). Furthermore, it remanded for entry of an order *granting* the defendants' motion for summary disposition. The dissenting Court of Appeals judge in *Auslander*, whose reasoning was adopted by the Court, opined:

> I fully acknowledge that a defendant must raise certain defenses in its first responsive pleading, and that a failure to do so may result in waiver of those defenses. See MCR 2.111(F)(2); MCR 2.111(F)(3). However, I conclude that [the] defendants were never required to raise or plead their asserted defenses in the first instance because this medical malpractice action was never properly commenced.
>
> [The p]laintiffs' claims arose, at the latest, at the time of the myocardial infarction in March 2003. "[T]he mere tendering of a complaint without the required affidavit of merit is insufficient to commence [a medical malpractice] lawsuit," and therefore does not toll the two-year period of limitations. *Scarsella v Pollak,* 461 Mich 547, 549-550; 607 NW2d 711 (2000). In this case, [the] plaintiffs wholly omitted to file the requisite affidavits of merit, and their complaint of September 2004 was therefore insufficient to toll the limitations period. *Id.* Regardless whether [the] defendants properly raised and preserved the statute-of-limitations and affidavit-of-merit defenses in their first responsive pleading, the period of limitations was not tolled by plaintiffs' complaint, and plaintiffs' claims were already time-barred at the time of the circuit court's ruling. *Id.* at 553. I would reverse and remand for dismissal with prejudice of [the] plaintiffs' claims. MCR 2.116(C)(7); *Scarsella, supra* at 551-552. (Ex. E, p. *10-11).

This Court's peremptory order constitutes binding precedent because, from the terms of the order and the Court of Appeals' unpublished opinion, lower courts could determine the applicable facts and the reason for the decision. *Wechsler v Wayne County Road Comm'n,* 215 Mich App 579, 591 n. 8; 546 NW2d 690 (1996), *remanded on other grounds,* 455 Mich 863; 567 NW2d 252 (1997). See also *Evans & Luptak, PLC v Lizza,* 251 Mich App 187, 195-196; 650 NW2d 364 (2002) (finding as binding precedent a peremptory order from the Supreme Court under similar circumstances); *Dykes v William Beaumont Hosp,* 246 Mich App 471, 483; 633 NW2d 440 (2001) ("An order that is a final Supreme Court disposition of an application and that

contains a concise statement of the applicable facts and reasons for the decision is binding precedent.")

Here Ms. Tyra filed a Complaint before the notice period expired and therefore never commenced this lawsuit. Even if the Court were to find that Defendants' affirmative defenses were not sufficient, the same result must be reached. A statute of limitations defense based on failure to comply with the notice waiting period of MCL 600.2912b is not required in an answer because the statute of limitations was not tolled by the premature filing of the Complaint. Filing a complaint and affidavit of merit prior to the expiration of the notice period did not toll the period of limitations. Plaintiff was thus not yet authorized to file a complaint and affidavit. A complaint and affidavit of merit will not toll the period of limitations where the requirements of §2912b have not been met. *Boodt v Borgess Med. Ctr.,* 481 Mich 558, 562-563; 751 NW2d 44 (2008).

Relying on *Auslander*, the Court of Appeals reached the same conclusion in *Simon v Widrig,* unpublished *per curiam* opinion of the Court of Appeals, decided July 15, 2008 (No. 277070) (Ex. I to Defendants' Application). Defendant filed a motion for summary disposition arguing that plaintiffs' claims were barred because plaintiffs' complaint, filed before the expiration of the notice period of MCL 600.2912b, was insufficient to commence a malpractice action and toll the statute of limitations. The remaining defendants joined in the motion. Initially plaintiffs' moved to strike defendant's affirmative defenses, claiming they were without supporting facts as required by MCR 2.111(F)(3) and thus defendants had waived the affirmative defenses. The trial court denied the motion. Defendant's statement that plaintiffs' claims failed to comply with §2912b and were barred by the statute of limitations put plaintiffs on notice that they failed to comply with the time requirements of §2912b(1). (Ex. I, p. * 2.) Citing *Burton,*

the trial court rejected plaintiff's argument that filing a complaint tolled the statute of limitations and granted summary disposition. *Id.* at *4.

On appeal, plaintiffs claimed that summary disposition was improperly granted to two of the defendants who failed to plead *either* a statute of limitations defense or any defense based on the failure to comply with §2912b as required by MCR 2.111(F)(2), and to a third defendant who failed to set forth facts to support its defense pursuant to MCR 2.111(F)(3). *Id.* at *5. The Court of Appeals rejected plaintiffs' argument that defendants should be precluded from asserting a statute of limitations defense because they failed to properly preserve it as required by MCR 2.111(F)(2):

> Because they filed the complaint before the notice period expired, plaintiffs never properly commenced this medical malpractice action. *Burton, supra* at 752. Therefore, defendants were not required to plead a statute of limitations defense in their answer. Regardless whether defendants properly raised and preserved such a defense in their answers, the two-year limitation period was not tolled by the filing of plaintiffs' complaint, and plaintiffs' claims were already time-barred at the time of the trial court's ruling. *Id.* at 756. Accordingly, we affirm the trial court's order granting defendant's motions for summary disposition with prejudice. *Id.* at *12.

Because Ms. Tyra never properly commenced her lawsuit, Defendants were not required to plead the statute of limitations in their answer, or that Plaintiff failed to comply with the notice provision of MCL 600.2912b. Based on *Auslander, supra,* even assuming that Defendants' affirmative defense was not sufficient, Defendants preserved the right to seek dismissal of Plaintiff's claim because a complaint filed before the expiration of the notice period is insufficient to commence a medical malpractice action and to toll the statute of limitations. Plaintiff's claims were already time barred at the time the trial court ruled.

CONCLUSION AND RELIEF REQUESTED

Defendants/Appellants request this Court to reverse the Court of Appeals decision and reinstate the circuit court's dismissal of Plaintiff-Appellee's action with prejudice.

Respectfully submitted,

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Dated: January 7, 2015

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

(On Appeal from the Court of Appeals)

LISA TYRA,

Plaintiff-Appellant,

vs.

ORGAN PROCUREMENT AGENCY OF MICHIGAN, a Michigan corporation d/b/a GIFT OF LIFE MICHIGAN, STEVEN COHN, M.D., DILLIP SAMARA PUNGAVAN, M.D., WILLIAM BEAUMONT HOSPITAL, a Michigan corporation, and JOHN DOE, believed to be Transplant Coordinator,

Defendants-Appellees.

Supreme Court No. 148087
Court of Appeals No. 298444
L.C. Case No. 09-103111-NH

CERTIFICATE OF E-SERVICE

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PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

I hereby certify that on January 7, 2015, I electronically filed *Supplemental Brief of Defendants/Appellants William Beaumont Hospital and Steven Cohn, M.D. and Proof of Service* attached hereto, with the Clerk of the Court using the True Filing system which will send notification of such filing to the following:

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